

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CHRISTY D. NOVICH, F.K.A,</b>	)
<b>CHRISTY D. BUSTAMANTE, F.K.A.</b>	)
<b>CHRISTY D. MITCHELL</b>	)
Claimant	)
	)
VS.	)
	)
<b>MANORCARE HEALTH SERVICES, INC.</b>	)
Respondent	)
	)
AND	)
	)
<b>INS. CO. OF STATE OF PENNSYLVANIA</b>	)
Insurance Carrier	)

Docket No. **1,049,367**

**ORDER**

Respondent and its insurance carrier request review of the February 29, 2012 Award by Administrative Law Judge Marcia L. Yates. The Board heard oral argument on June 20, 2012.

**APPEARANCES**

Michael W. Downing of Kansas City, Missouri, appeared for the claimant. Carolyn M. McCarthy of Kansas City, Missouri, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The claimant alleged she suffered a low back injury at work while lifting a combative patient. She was referred for treatment, taken off work for a week, provided physical therapy and medications. She was placed on light-duty work and ultimately released to

return to work without permanent restrictions. But claimant's employment was terminated shortly after her release to full duty when she failed to show up for work. She then discovered she was pregnant and she did not receive any further medical treatment for her back injury. The claim proceeded to hearing and the Administrative Law Judge (ALJ) found claimant suffered a 15 percent functional impairment and also a 50 percent work disability based upon a 100 percent wage loss and a 0 percent task loss.

Respondent requests review of whether claimant's accidental injury arose out of and in the course of her employment with respondent. At oral argument before the Board the respondent agreed its argument is better stated as claimant failed to meet her burden of proof to establish she suffered any permanent partial impairment as a result of her accident at work. Conversely, claimant argues that the ALJ's Award should be affirmed.

The issues for Board determination include whether claimant suffered a work-related accidental injury and, if so, the nature and extent of disability, if any.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began working as a certified nurse's aide (CNA) for respondent in February 2009. Her job was taking care of the residents by helping them with bathing, dressing, feeding and using the toilet. On November 24, 2009, she was assisting co-workers lift a combative 300 pound patient onto his bed. The patient pulled claimant down which jerked her back causing lower and middle back pain.

Claimant reported her injury the same day and she was sent to Occupational Health Services for treatment. She was taken off work and sent to physical therapy for approximately two weeks. She was released to return to light-duty work and then released to full-duty work without restrictions on December 24, 2009. But claimant was terminated from respondent's employ on December 30, 2009, for her failure to show up for work. Claimant applied for unemployment benefits in January 2010 and was applying for work but could not find a job.

At her last visit with Dr. Tiemann, after completion of two weeks of physical therapy, claimant reported that she was pain free during the day with minor back spasms at night. But claimant later testified she continued to have back spasms, could not sleep at night, could not bend over and could not sit for long periods of time.

In January 2010, claimant found out that she was pregnant and due in September 2010. Claimant was later told her pregnancy was high risk and she was told she should rest as much as possible and not work.

Dr. Michael Poppa, board certified in occupational and preventive medicine, examined and evaluated claimant on March 26, 2010, at claimant's attorney's request. The claimant was in the second trimester of her pregnancy. The doctor reviewed claimant's medical records and also took a history from her. At the time of this evaluation, claimant was continuing to experience pain involving her back and problems with performing activities of daily living.

Upon physical examination, Dr. Poppa found claimant had decreased sensitivity upon pinprick testing in her right lower leg which is a possible indication of intermittent or nerve root impingement involving her lumbar spine. Seated straight leg raising caused bilateral lower back pain and range of motion of her lumbar spine also caused pain. Claimant also had complaints of pain upon palpation overlying her lower thoracic paraspinous muscles as well as her lumbar paraspinous muscles. At the time of this evaluation, Dr. Poppa determined that claimant had not reached maximum medical improvement due to findings of decreased sensitivity to pinprick overlying lateral aspect of her lower extremity. The doctor recommended additional diagnostic testing which included an MRI of the lumbar spine and an EMG of her lower extremities. Claimant was placed on light-duty work which limited lifting, pushing, pulling and carrying to 20 pounds on an occasional basis and 10 pounds on a frequent basis.

In the event claimant did not receive any additional treatment, Dr. Poppa provided a rating based upon claimant's condition on the day he examined her. Based on the *AMA Guides*<sup>1</sup>, Dr. Poppa provided a 10 percent impairment to claimant's body as a whole due to secondary lumbar radiculopathy. He also gave her a 5 percent impairment to the body as a whole for her thoracic strain with remaining symptoms. These impairments combine for a 15 percent whole body impairment. Dr. Poppa reviewed the list of claimant's former work tasks prepared by Mr. Michael Dreiling and concluded claimant could no longer perform 8 of the 23 tasks for a 35 percent task loss.

Because of the pregnancy, claimant was not able to have the additional testing recommended by Dr. Poppa. Claimant delivered her baby on August 30, 2010.

Dr. Terrence Pratt, board certified in physical medicine and rehabilitation, examined and evaluated claimant on November 11, 2010, at respondent's attorney's request. The doctor reviewed claimant's medical records and noted that claimant had complained of low back pain on May 7, 2008, at Providence Medical Center. Also on July 26, 2009, claimant was involved in an automobile accident with complaints of upper, mid and low back pain. Claimant was having pain and muscle spasms after the accident. Dr. Pratt opined that the medical records from November and December 2009 indicated that claimant had

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

subjective complaints greater than objective findings. She was able to do her normal job tasks.

Upon physical examination, Dr. Pratt found claimant had 5/5 inappropriate responses on the Waddell's assessment (specific for low-back pain) which suggested symptom magnification. Claimant was unable to get on the examination table and had significant limitations of her range of motion. After taking a history from claimant and performing the physical examination, the doctor diagnosed claimant with lumbosacral discomfort with non-verifiable radicular symptoms and inappropriate responses on examination. Dr. Pratt could not relate claimant's symptoms to her November 2009 accident noting claimant's improvement after treatment and her ability to work without restrictions. Dr. Pratt recommended an MRI of claimant's spine and it was performed on February 8, 2011. The MRI revealed degenerative-type changes in the lower lumbar region and a small posterior annular tear but the MRI was read as showing degenerative changes without any central canal, lateral recess or neural foramen stenosis. Dr. Pratt was unable to relate the findings of the MRI to claimant's reported injury of November 2009.

Dr. Pratt did not recommend any additional treatment and no permanent restrictions were placed on claimant due to her injury of November 2009. Dr. Pratt reviewed the list of claimant's former work tasks prepared by Mr. Bud Langston and concluded claimant could perform 18 of the 18 tasks for a 0 percent task loss.

Michael Dreiling, a vocational consultant, conducted a personal interview with claimant on August 23, 2011, at the request of claimant's attorney. He prepared a task list of 23 nonduplicative tasks claimant performed in the 15-year period before her injury.

Bud Langston, a vocational consultant, conducted an interview with claimant on December 2, 2011, at the request of respondent's attorney. He prepared a task list of 18 nonduplicative tasks claimant performed in the 15-year period before her injury.

Before the alleged accidental injury on November 24, 2009 claimant was in a car accident in July 2009 which resulted in complaints of back pain. She also was treated at the hospital on September 18, 2009 after her then husband had pushed her against a wall and she was discovered unresponsive outside her home. She had complaints of back pain. But claimant said the back pain from those incidents had fully resolved before the accident at work.

Before the birth of her child on August 30, 2010, claimant was seen at the hospital on July 9, 2010; July 28, 2010; July 29, 2010; July 30, 2010; and August 20, 2010 for complaints due to her pregnancy. The medical records do not document any back complaints.

After the birth of her child claimant received hospital treatment at Providence Medical Center for a variety of complaints on November 7, 2010; December 25, 2010;

January 4, 2011; September 9, 2011; and October 5, 2011. It is significant to note the medical records on January 4, 2011, indicated claimant had occasional back spasms secondary to a motor vehicle accident in the past. Otherwise, the medical records do not document any back complaints at these visits. At the December 25, 2011 visit it was noted claimant's back was normal with no tenderness and normal range of motion. And at the October 5, 2011 visit the record indicates claimant had no back pain.

Initially, the record establishes that claimant suffered a work-related accidental injury on November 24, 2009. The dispositive issue is the nature and extent of her impairment, if any.

When Dr. Poppa examined claimant she was in the second trimester of her pregnancy and Dr. Poppa noted claimant was not at maximum medical improvement at that time. But the doctor proceeded to rate claimant and impose restrictions. Conversely, after claimant gave birth she was examined by Dr. Pratt who noted that claimant had positive findings on 5/5 of the Waddell tests he performed which was suggestive of symptom magnification. After the preliminary hearing held in this case the ALJ noted in her Preliminary Decision, in pertinent part:

The court notes that claimant demonstrated bizarre behavior during the course of her cross examination that was not present during the direct examination. She attributed this to back spasms. This behavior certainly supports Dr. Pratt's initial finding of 5/5 Waddell signs.

Dr. Pratt further determined that claimant had received treatment following the November 24, 2009 accident and had returned to work without restrictions, consequently, he was unable to attribute her current back complaints to that incident.

In summation, claimant was injured, received treatment and then released to work without restrictions. After she was terminated she sought employment until her high risk pregnancy intervened. Despite her testimony that her back pain was constant, the medical records before and after the delivery of her child do not support that contention. Although Dr. Poppa rated claimant he did so while she was in the second trimester of her pregnancy and admittedly before she had reached maximum medical improvement which undermines his opinion. Significantly, and despite claimant's testimony that she improved after the automobile accident in July 2009, at a January 2011 hospital visit she noted occasional back spasms attributable to the motor vehicle accident. At claimant's examination by Dr. Pratt claimant was unable to get on the examination table, had significant loss of range of motion and was positive on 5/5 of the Waddell tests. But at later hospital visits she did not have those difficulties and at the December 25, 2011 hospital visit it was noted claimant's range of motion was normal. The evidentiary record supports Dr. Pratt's conclusion that claimant's back complaints and condition are not related to the November 24, 2009 accidental injury. The Board agrees and finds claimant suffered accidental injury but did not suffer permanent impairment from that accident.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>2</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Marcia L. Yates dated February 29, 2012, is affirmed to find claimant suffered accidental injury on November 24, 2009 and modified to find claimant failed to meet her burden of proof to establish she suffered permanent impairment.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant, mdowning@etkclaw.com  
Carolyn M. McCarthy, Attorney for Respondent and its Insurance Carrier  
cmccarthy@mwklaw.com  
William Belden, Administrative Law Judge

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<sup>2</sup> K.S.A. 2010 Supp. 44-555c(k).